BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER C. BROWN Claimant VS. **BEAVER EXPRESS SERVICE** Respondent AND **INSURANCE COMPANY OF NORTH AMERICA** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 181,022

ORDER

On the 18th day of April, 1995, the applications of both the respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl on October 27, 1994, came regularly on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through his attorney Robert R. Lee of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney Vincent Burnett of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged.
(2) The nature and extent of claimant's injury and disability.
(3) The liability of the Kansas Workers Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the evidence is sufficient to find claimant has suffered accidental injury arising out of and in the course of his employment to both knees while employed with respondent during the period July 15, 1993 through July 29, 1993.

Claimant began working as a short-haul driver for the respondent in June 1993. His responsibilities included loading and unloading his delivery truck, performing pre-and post-trip checks on the vehicles, and driving the delivery truck to the various delivery locations. Claimant alleged that, on July 15, 1993, after being employed with respondent for approximately three (3) weeks, as he jumped from the truck, he suffered a traumatic injury to his right knee. Claimant did not initially tell respondent of the problem hoping that it would go away. Claimant's knee did not improve and, in fact, worsened during the days following the initial traumatic injury. During this period of time, claimant over compensated due to the problems with the right knee and, as a result, suffered a series of traumatic injuries to his left knee.

When claimant finally reported the injury to the respondent on July 28, 1993, respondent referred him to Dr. Wilson of the Broadway Clinic. He was taken off work, put in braces, and given crutches. Shortly thereafter, Dr. Wilson referred claimant to Dr. Kenneth Jansson, a board-certified orthopedic surgeon.

Dr. Jansson first examined claimant on August 9, 1993. He found claimant's injury to be consistent with his history. After reviewing the medical tests performed on claimant and performing an examination, he opined claimant was in need of bilateral knee surgery. Surgery on the right knee was performed August 20, 1993, consisting of a chondroplasty of the patella, medial femoral condyle and lateral femoral condyle. He found claimant's cartilage surfaces to be loose and unstable. The surgery was intended to trim the surfaces of the cartilage back in order to make them more stable. He also performed a partial medial meniscectomy of the medial meniscus. Surgery on the left knee was performed October 19, 1993.

The claimant was released January 3, 1994, with restrictions based partially upon the doctor's examination and partially upon a functional capacity evaluation performed on claimant at the doctor's request. Claimant was released with restrictions allowing occasional kneeling and stair and ladder climbing with frequent squats, bends and stoops. Claimant was placed on a fifty (50) pound lifting restriction and advised against jumping in and out of trucks. These restrictions were intended to be temporary with Dr. Jansson opining he would not give claimant permanent restrictions without seeing him again. He felt since claimant had been advised to return if he was having problems and claimant had

not returned for a follow-up examination, claimant was not having significant permanent problems. Absent the opportunity to reexamine claimant, Dr. Jansson would not provide permanent restrictions to the claimant.

Claimant was also examined at the request of claimant's attorney by Dr. Ernest Schlachter. Dr. Schlachter diagnosed aggravation of preexisting meniscus injuries, coupled with degenerative changes in both knees. He rated claimant at eleven percent (11%) whole body functional impairment, which is fairly consistent with the eight percent (8%) whole body functional impairment assessed claimant by Dr. Jansson. The parties have stipulated a nine and one-half percent (9.5%) functional whole body impairment.

Claimant alleges entitlement to a work disability as a result of his bilateral knee problems. Claimant was referred to Mr. Jerry Hardin by his attorney and to Ms. Karen Terrill by the attorney for the respondent, regarding the specific job tasks claimant had performed in the last fifteen (15) years of employment. K.S.A. 44-510e states, in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment." Emphasis added.

Claimant submits the opinion of Dr. Ernest Schlachter regarding what work tasks claimant would be capable of performing subsequent to his bilateral injuries suffered while working with the respondent. Dr. Schlachter's testimony was objected to by the respondent. Respondent contends the language of K.S.A. 44-510e discussing "the physician" refers to the treating physician, and none other. This philosophy was rejected by the Administrative Law Judge in the Award and is likewise rejected by the Appeals Board in this opinion. Had the legislature intended for the opinion to be limited to only the treating physician, the Appeals Board is confident the legislature would have so specified. The Appeals Board finds that a qualified physician, with appropriate information on which to base an opinion, has the expertise to testify regarding the claimant's lost ability to perform work tasks.

Dr. Schlachter based his opinion exclusively upon what is alleged to be the report of Mr. Jerry Hardin. Regrettably, Mr. Hardin did not testify in this matter and there was never, during the direct examination of Dr. Schlachter, a specific identification of Mr. Hardin's report. The use of this report by Dr. Schlachter, and its admission into evidence were both objected to by respondent. The Appeals Board finds it significant that Dr. Schlachter, in reviewing the information purported to be that of Mr. Hardin, did not comprehend the information contained within the report. On several occasions claimant's attorney, during Dr. Schlachter's deposition, had to explain the information contained within the report to Dr. Schlachter. Under the circumstances, this lack of understanding of the information contained within the report is fatal to Dr. Schlachter's opinion regarding claimant's loss of task performing abilities. Claimant's Exhibit Number 1 from Dr. Schlachter's deposition, the January 28, 1994 report of Dr. Schlachter, contains no discussion regarding claimant's task performing ability or loss thereof. It appears from our

reading of the deposition that the information contained in claimant's Exhibit Number 2 was provided to the doctor just prior to the doctor's deposition and that the doctor did not understand the information contained therein. It is further relevant that claimant did not testify regarding the tasks listed in this report.

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-501(e).

K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true", on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The opinion of Dr. Schlachter, when based upon a report not properly admitted into evidence and which the doctor obviously did not fully understand, does not rise to the level of credible evidence. As such, the Appeals Board finds Dr. Schlachter's opinion regarding claimant's inability to perform work tasks, as required by K.S.A. 44-510e, does not constitute competent evidence. This evidence is untrustworthy and, as such, will be disregarded by the Appeals Board. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191 (1976).

Claimant was referred to Ms. Karen Terrill for evaluation of claimant's task performing abilities or the loss thereof. Ms. Terrill, in providing information regarding claimant's prior tasks and his ability or inability to perform same, took into consideration a preexisting forty-five (45) pound lifting restriction placed upon claimant earlier in his employment career. Claimant testified that this restriction was violated by his job requirements with respondent. He testified that he did not consider this restriction to be valid or necessary and he had not followed this restriction during his employment with respondent. Dr. Jansson, in reaching an opinion regarding claimant's loss of task performing ability, took into consideration the opinion of Ms. Karen Terrill, as well as the information contained in Ms. Terrill's report regarding claimant's lost ability to perform work tasks. The Administrative Law judge rejected this opinion citing the Appeals Board prior case of Flores, Jr. v. Cameron Drywall, Docket Number 152,948, January, 1994. Under the facts of that case, the Appeals Board held that claimant's prior restrictions would not be considered to reduce work disability where the claimant returns to work and successfully worked outside of his restrictions for several years before the accident. Claimant did, in the instant case, work for several years at a variety of jobs, which required that he exceed the forty-five (45) pound limitation placed upon him. In analyzing the use of the forty-five (45) pound limitation the Appeals Board finds that the task loss analysis opinion rendered by Dr. Jansson would have been greater than the five to ten percent (5-10%) found by Dr. Jansson had claimant's forty-five (45) pound preexisting limitation not been considered. This would make the five to ten percent (5-10%) limitation the floor of claimant's task loss for purpose of considering work disability. Thus the Administrative Law Judge's finding that claimant had no significant loss of ability to perform tasks prior to his 1993 injury and his rejection of the opinions of Dr. Jansson and Ms. Terrill do not appear appropriate under these circumstances. The Appeals Board adopts the findings of Dr. Jansson as being the

only evidence regarding claimant's task loss even though it does agree a more accurate portrayal of claimant's task loss without consideration of the forty-five (45) pound weight limitation might have given claimant a greater work disability.

The Appeals Board must also consider the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is earning after the injury. In this instance claimant is unemployed and thus has a one hundred percent (100%) wage loss when considering the appropriate components of K.S.A. 44-510e. This statute does require that each prong of the wage factor be averaged. Thus the five to ten percent (5-10%) task loss which the Appeals Board finds equates to a seven and one-half percent (7.5%) task loss when averaged with the one hundred percent (100%) wage loss computes to a work disability of fifty-four percent (54%). The Appeals Board finds based upon the evidence presented that claimant is entitled to a fifty-four percent (54%) permanent partial general body work disability as a result of the injuries suffered while employed with respondent on the dates alleged.

The Appeals Board must next decide what, if any, liability to impose upon the Kansas Workers Compensation Fund. K.S.A. 44-567(a) provides:

> "An employer who operates within the provisions of the workers compensation act and who knowingly employees or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation or be entitled to an apportionment of the costs thereof as follows: . . .
>
> (2) subject to the other provisions of the workers compensations act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the administrative law judge finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the administrative law judge shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund."

The Administrative Law Judge found respondent had met its burden of proving knowledge of a preexisting condition. This knowledge stemmed from information provided to the respondent during claimant's pre-employment DOT physical. The Appeals Board agrees with and adopts this finding. The Appeals Board must next decide whether there should be an apportionment of the award between the respondent and the Fund. The medical testimony establishes claimant had prior knee surgeries and a prior functional impairment to his knees. Dr. Schlachter opined that claimant would not have suffered the alleged injuries in 1993 "but for" his preexisting problems. Dr. Jansson, on the other hand, opined that claimant had a forty percent (40%) contribution to his knee injuries from the preexisting injuries. The Administrative Law Judge, in assessing seventy percent (70%) of the Award upon the Kansas Workers Compensation Fund, based her decision upon the medical opinions of both Dr. Schlachter and Dr. Jansson. The Appeals Board finds that case law in Kansas requires that "the apportionment of the award between the Fund and the respondent must be based on the actual amount of the disability which is attributable to the second injury as well as the extent that the handicap contributed to the second injury." Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 698 P.2d 392, (1985); Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, 609 P.2d 687, rev. denied 228

Kan. 807 (1980). The findings of the Administrative Law Judge regarding Fund liability are well supported by the record and the Appeals Board adopts same as its own, and assesses seventy percent (70%) of the liability in this matter for all costs and expenses associated with this case to the Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of the claimant, Christopher C. Brown, and against the respondent, Beaver Express Service, and its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund, for accidental injuries to his knees sustained during the period July 15, 1993 through July 29, 1993. Claimant is entitled to 23 weeks temporary total disability based upon an average weekly wage of $368.15, at the rate of $245.45 per week totaling $5,645.35 followed by 2.14 weeks permanent partial general body functional impairment at the rate of 9.5% at the rate of $245.45 per week in the amount of $525.26, followed thereafter by 217.64 weeks permanent partial general body work disability at the rate of $245.45 per week in the amount of $53,419.74 for a total award of $59,590.38.

As of October 6, 1995, claimant would be entitled to 23 weeks temporary total disability compensation at the rate of $245.45 per week totaling $5,645.35, followed by 2.14 weeks permanent partial general body functional impairment at the rate of $245.45 per week totaling $525.26, followed thereafter by 91.15 weeks permanent partial general body work disability at the rate of $245.45 per week totaling $22,372.77 for a total of $28,543.41 which is due and owing in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 126.49 weeks permanent partial general body work disability at the rate of $245.45 per week until fully paid or until further of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his attorney is hereby approved insofar as it is not in contravention with the statute.

Respondent is entitled to reimbursement from the Kansas Workers Compensation Fund for 70% of all costs, medical expenses, and disability awarded in this matter with 70% of all future payments to be assessed against the Kansas Workers Compensation Fund.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed 30% against the respondent and its insurance carrier and 70% against the Kansas Workers Compensation Fund to be paid as follows:

Satterfield Reporting Services	
Deposition of Christopher C. Brown	$190.00
Deposition of Karen Crist Terrill	$200.00
Deposition of John Guffey	$132.40
Deposition of Kenneth A. Jansson, M.D.	$229.40
Barber & Associates	
Transcript of Regular Hearing	$313.10
Transcript of continuation of Regular Hearing	$117.40
Don K. Smith & Associates	
Deposition of Ernest R. Schlachter, M.D.	$343.00

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, Kansas
Vincent Burnett, Wichita, Kansas
Cortland Q. Clotfelter, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director